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Damages: Remittitur and Additur in Wisconsin: Bringing the Powers Rule Up to Date

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DAMAGES: REMITTITUR AND ADDTIUR IN WISCONSIN: BRINGING THE POWERS RULE UP TO DATE

Since the *Powers*[1] case was decided in 1960, the rule established by that decision has been applied in many Wisconsin cases in which the excessiveness or inadequacy of the awards was in question. The cases from *Powers* through *Spleas v. Milwaukee & Suburban Transport Corp.*[2] have been adequately considered elsewhere.[3] Therefore, the primary purpose of this comment shall be to examine and bring together the cases after *Spleas* in which the *Powers* rule was extended, modified, or curtailed.

1. *Treatment of Excessive or Inadequate Awards Prior to Powers*

In 1860 the Wisconsin Supreme Court recognized the practice of remitting in cases in which the excessive part of the award was clearly distinguishable.[4] This decision made it clear that the opportunity to remit would not be available when the excessive amount could not be distinguished and to attempt to do so would be to assume a function of the jury. A short time later the power of the trial court to set a limit beyond which the jury could not go in the assessment of damages was recognized.[5] Justice Hanley, in his article on excessive damages,[6] has stated: "This rule of specifying the sum that could not be exceeded is the basis of all the decisions that developed the power of the court to deal with excessive or inadequate damages."[7]

The power afforded trial courts by these decisions was expanded in *Corcoran v. Harran.*[8] Here it was held (in case of an excessive verdict) that a trial court has the power to grant a new trial or to permit the plaintiff to remit the excess and take judgment for the remainder. This was limited again in cases in which the award was clearly excessive.

The next step toward *Powers* was taken in *Rueping v. C. & N.W.R.R. Co.*[9] where alternative options were granted for the first time. A new trial was ordered, after verdicts of $12,000 in the first trial and $9,500 in the second were declared excessive, unless the defendant accepted a judgment against him for $5,000 or plaintiff accepted a judgment in his favor of $2,500.

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[1] Powers v. Allstate Ins. Co., 10 Wis. 2d 78, 102 N.W.2d 393 (1960).

[2] 21 Wis. 2d 635, 124 N.W.2d 593 (1963).

[3] Wilkie, *Personal Injury Damage Verdicts: Supreme Court Rulings Since The Powers Rule,* 47 MARQ. L. REV. 368 (1964); Ghiardi, *Personal Injury Damages —Excessive or Inadequate Awards,* 1 Wis. Con't. Legal Ed. 27 (1961).

[4] Nudd v. Wells, 11 Wis. 407 (1860).

[5] Potter v. Chicago & Northwestern Railway Company, 22 Wis. 586 (1868).

[6] Hanley, *Dealing With Excessive Verdicts,* 34 WIS. B. BULL. 25 (Oct. 1961).

[7] *Id.* at 26.

[8] 55 Wis. 120, 12 N.W. 468 (1882); *see also* Baker v. Madison, 62 Wis. 137, 22 N.W. 141 (1885).

[9] 123 Wis. 319, 101 N.W. 710 (1904).

With the basework laid, the policy to be followed until *Powers* was established in *Heimlich v. Tabor*.[10] The court stated that when the option was given to the plaintiff, the amount set as a reasonable figure should be as low as an impartial jury, considering all the evidence, could find. When the option was given to the defendant, the amount set should be as large as an impartial jury, considering all the evidence, could find. This rule of law was reaffirmed in *Campbell v. Sutliff*.[11] In that case, the court also answered the question of the constitutionality of remititur:

> The defendant's constitutional rights are not invaded because the judgment is reduced to the least amount which the plaintiff may recover as determined by the court that has the power to fix the minimum amount that may be recovered—the smallest verdict which the court will permit to stand.
>
> Conversely neither party can complain when the defendant elects to consent to the entry of judgment for the sum which the court determines to be the largest amount which a jury could assess under the proof. The defendant can not question the judgment because he has elected to have it entered. The plaintiff cannot question it because it is for the largest amount which the court will permit the jury to assess under the proof of the case. Thus it will be seen that the court is acting within the scope of the powers possessed by it in trial by jury as guaranteed by the constitution and that neither party is deprived of his constitutional right to a trial by jury without his consent.[12]

This continued to be the rule applied in dealing with excessive and inadequate awards until *Powers* was decided.

2. *The Powers Rule*

The rule of *Powers v. Allstate Ins. Co.*[13] has been the governing law in cases involving excessive and inadequate awards since 1960. The rule is brief and easily understood from the words of the court:

> . . . that where an excessive verdict is not due to perversity or prejudice, and is not the result of error occurring during course of trial, the plaintiff should be granted the option of remitting the excess over and above such sum as the court shall determine is the reasonable amount of plaintiff's damages, or of having a new trial on the issue of damages.[14]

Justice Fairchild had suggested this rule in his dissenting opinions in *Gennrich v. Schrank*[15] and again in *Puhl v. Milwaukee Automobile Ins. Co.*[16] In the *Gennrich* dissent he stated:

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[10] 123 Wis. 565, 102 N.W. 10 (1905).
[11] 193 Wis. 370, 214 N.W. 374 (1927).
[12] *Id.* at 379, 214 N.W. at 377.
[13] Note 1 *supra.*
[14] 10 Wis. 2d at 91, 102 N.W.2d at 400.
[15] 6 Wis. 2d 87, 93 N.W.2d 876 (1959).
[16] 8 Wis. 2d 87, 99 N.W.2d 163 (1959).

> But where there has been no error or perversity, there would be no injustice to defendant in giving plaintiff an option of a new trial or judgment for an amount fixed by the court as a fair and reasonable award under the evidence. Such a rule would give greater protection to the plaintiff. While he could still choose a new trial, his alternative would be more liberal to him than under the present rule. It would sufficiently protect the defendant from the excessive award.[17]

With the rule laid down in *Powers* the court, in effect, reverted to the proceedure as set out in the *Corcoran* and *Baker*[18] cases and overruled the *Heimlich* and *Campbell*[19] cases insofar as they held that such a rule of a *reasonable sum* violates the parties constitutional rights to a trial by jury.

3. *Recent Cases and Their Effect on the Powers Rule*

A. Abuse of Discretion

When a trial court, after reviewing all the evidence, finds a jury verdict excessive and applies the *Powers* rule to give one party the option of a new trial on damages or accepting an additur or remittitur, the supreme court stated that it will reverse only if it finds *an abuse of discretion.*[20] Abuse of discretion, (either in finding the verdict excessive or in setting a *reasonable* amount in place of the jury award) is an issue found in almost every appellate case in which the *Powers* rule has been applied. This is to be expected and is built into the rule itself.

When this is the issue on apepal, the court is required to review all the evidence in the light most favorable to the respondent. The court stated:

> On appeal from a determination by the trial court that the found damages were excessive, this court will not find an abuse of discretion if there exists a reasonable basis for the trial court's determination after resolving any direct conflicts in the testimony in favor of plaintiff.[21]

After the issue of the trial court's abuse of discretion is settled, the issue which naturally follows is whether the figure set by the trial court as a reasonable award under the *Powers* rule is in fact reasonable. The determination of this issue is in effect a second determination of abuse of discretion. In a recent case[22] the court gave its definition of reasonable damages.

> Where this court finds no abuse of discretion in a trial court's determining that the damages awarded by a jury are excessive, it is only in an unusual case that we will disturb the amount

[17] 6 Wis. 2d at 94, 93 N.W.2d at 879.
[18] Note 8 *supra.*
[19] Notes 10 and 11 *supra.*
[20] Boodry v. Byrne, 22 Wis. 2d 585, 126 N.W.2d 503 (1964); Lucas v. State Farm Mut. Automobile Ins. Co., Wis. 2d 568, 117 N.W.2d 660 (1962).
[21] Boodry v. Byrne, 22 Wis. 2d 585, 589, 126 N.W.2d 503, 505 (1964).
[22] *Id.* at 595, 126 N.W.2d at 508.

> which the trial court has fixed as reasonable for the purpose of granting the plaintiff an option to accept judgment in that amount in lieu of a new trial on damages. It cannot be held that a certain amount alone represents reasonable damages for a particular injury, or injuries, and that anything below or above that is unreasonable. In other words, reasonable damages fall anywhere between an unreasonable low and an unreasonable high.[23]

An answer of this type really only restates the question. However, it is a question itself if there is any more specific answer available, as the question of reasonablness must always turn on the facts in each individual case.

The court continued in *Boodry*[26] and set down the test it applies in determining reasonableness: ". . . we apply the test of whether, if the trial court had been sitting as sole trier of the facts and had fixed damages in such amount, we would disturb such findings."[25]

In a later case,[26] the court went on to further define the procedure it would follow on appeal, stating it is not its purpose to determine if the award is high or low, nor to substitute its judgment for that of the juries of the trial court, but to determine if the award was within reasonable limits.[27] The reasonable limits referred to were those set out in *Boodry* as lying somewhere between an unreasonably high and an unreasonably low sum.[28] It should be added at this point that the supreme court, in applying the previously mentioned tests and standards, looks to the trial court's reasons for finding a verdict excessive. In their absence, the court must review the entire record as a matter of first impression. It therefore seems important that an attorney expecting an appeal secure such an analysis from the trial court. The supreme court has seen fit to spell this out:

> A trial court reviewing a personal-injury jury verdict and finding such a verdict excessive should state its reasons for its determination. In the absence of such an analysis the court on appeal must, as here, review the entire record as a matter of first impression and ascertain whether, in its judgement, the verdict is excessive.[29]

The *Boodry* case was to become the starting point for one of the important changes in the *Powers* rule found in the recent cases. The facts of *Boodry* show that a jury verdict for personal injuries was returned in the sum of $15,280. This was found excessive by the trial court and a sum of $6,000 was set as a reasonable amount. The plaintiff

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[23] *Ibid.*
[24] Note 21 *supra.*
[25] *Id.* at 596, 126 N.W.2d at 508.
[26] Olson v. Siordia, 25 Wis. 2d 274, 130 N.W.2d 827 (1964).
[27] *Id.* at 286, 130 N.W.2d at 833.
[28] Boodry v. Byrne, 22 Wis. 2d 585, 126 N.W.2d 503, 508 (1964).
[29] Moritz v. Allied American Mut. Fire Ins. Co., 27 Wis. 2d 13, 24, 133 N.W.2d 235, 241 (1965).

was given the option of accepting the lower figure or a new trial on the issue of damages. The plaintiff did not exercise the option and appealed. On appeal it was held that the trial court did not abuse its discretion in finding the jury's award excessive nor in setting the amount of reasonable damages at $6,000. The court did find that the $6,000 figure approached the bottom of the range of reasonable damages. Justice Wilkie dissented and suggested a new procedure to be followed when the verdict is excessive in the eyes of the supreme court, but the amount set by the trial court is found not to fall within the range of reasonableness. Since the adoption of the *Powers* rule the supreme court had not seen fit to raise the amount of the option determined by the trial court. It had however reinstated the jury verdict in several cases.[30] Justice Wilkie felt that the amount set by the trial court ($6,000) was beneath the range of reasonableness and that a higher amount should have been set. He suggested that the supreme court itself raise the option rather than limit itself to reinstating the jury award or ordering a new trial on the issue of damages. He would have the court do this by holding first, that the trial court had abused its discretion in setting the amount of the option, and second, that $10,000 would be a reasonable amount.[31] Thus, a new option would be offered to the party in the amount set by the supreme court. The time in which the option was to be exercised would presumably run from the date the new amount was set at the supreme court level.

Justice Wilkie again dissented in *Olson v. Siordia*.[32] In that case the jury award of $25,000 was declared excessive by the lower court and this determination was affirmed on appeal. The lower court set $8,500 (a reduction of $16,500) as a reasonable amount and gave the *Powers* option. On appeal, the majority stated that $8,500 appeared to be low but affirmed the reduction and declared the amount set as within the range of reasonableness. Justice Wilkie again detailed the procedure he would prefer to have used in cases of this type.

> Here I would follow the procedure set forth in my dissent in *Boodry* . . . and raise the amount of the option, *first* holding that the trial court abused its discretion in setting the amount of the option, and *second,* determining a reasonable sum (in lieu of the sum fixed by the trial court) as the total amount of the general damage award.
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> I realize that since *Powers* there has been no case wherein (1) our court has affirmed a trial court's finding that a jury award is excessive, and (2) our court had found a sum deemed reasonable by the trial court to be inadequate and below the range

[30] Makowski v. Ehlenbach, 11 Wis. 2d 38, 103 N.W.2d 907 (1960); Delong v. Sagstetter, 16 Wis. 2d 390, 114 N.W.2d 788 (1962); O'Brien v. State Farm Mut. Automobile Ins. Co., 17 Wis. 2d 551, 117 N.W.2d 654 (1962).
[31] Boodry v. Byrne, 22 Wis. 2d 585, 597, 126 N.W.2d 503, 509 (1964).
[32] Wis. 2d 274, 286, 130 N.W.2d 827, 834 (1964).

> of reasonably debatable amounts for a jury award. I would say that this presents just such a case. So, too, did *Boodry*. In effect, I would rewrite the option, raising the figure to a sum that is within the range of reasonably debatable amounts. To do this requires no modification of the *Powers* rule, but merely a new and logical refinement for the application of that rule.[33]

A portion of Justice Wilkie's suggested procedure was adopted by our court in *Moldenhauer v. Faschingbauer*.[34] The jury awarded the plaintiff $43,012 for personal injuries and special damages. On motions after verdict the trial court ordered a new trial on all the issues. This order was appealed and the supreme court held that the jury's findings on negligence should stand. However, the jury's award of $43,012 was found excessive and the court ordered a new trial on the damage issue unless the plaintiff accept judgment for such a reduced amount as found reasonable by the trial court. Upon demand, the trial judge ordered a new trial on the issue of damages with the option to the plaintiff to take judgment for the reduced amount of $13,012. The plaintiff did not accept this reduced amount. On appeal from the decision of the trial court it was said:

> Our review of the evidence persuades us that the learned trial court abused its discretion in setting the total damages in the sum of $13,012, and accordingly it is our obligation to fix a proper figure and to permit the plaintiff to have the option of accepting such figure in lieu of a new trial as to damages.
>
> This would appear to be the first occasion on which this court has determined that a trial court, in applying the *Powers* rule, has reduced the damages below a reasonable figure. . . . In applying the *Powers* rule to the finding of a jury, the court's duty is to set a figure that is deemed most reasonable, and any figure within the range of reasonableness would be appropriate. However, once the trial court has reduced the jury's verdict and on review we find an abuse of discretion on the part of the trial court, we deem it our duty to set the figure which we consider to be at the *bottom* of the range of reasonableness and to permit the plaintiff to have the option of accepting such figure if he wishes to avoid a new trial. . . .
>
> We consider that an important purpose of the *Powers* rule, the elimination of unnecessary retrials, is best served by the technique which we are here adopting. It is arguable that this court should set what it deems to be the most reasonable figure rather than the lowest reasonable figure. In view of the fact that the trial judge, from his special vantage point, has seen fit to adopt an even lower figure, we believe that justice will be advanced by our declining to fix anything but the *lowest* reasonable figure. This method will be employed when we review an adjustment

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[33] *Id.* at 287, 130 N.W.2d at 834.

[34] 30 Wis. 2d at 622, 141 N.W.2d 875 (1965).

> of damages made by the trial court; it will not apply when either this court or a trial court examines the verdict of the jury.[35]

The court set $19,012 as the "lowest reasonable figure."

The procedure adopted, while undoubtedly an improvement in the application of the *Powers* rule, is certainly open to argument as suggested by the court. The very reasoning of the court itself in previous cases makes it reasonable to say that it has placed upon itself, in limiting its discretion to the lowest reasonable amount, the very procedure and limits it overruled in the *Powers* case. Until *Powers*, it will be remembered, the trial court, after finding a verdict excessive or inadequate, had discretion to set the award only as low as or as high as a properly instructed jury could find. *Powers* destroyed these limits for the more equitable "reasonable-amount standard." Now, under *Moldenhauer*, the court is again bound by the lowest—and it is to be assumed highest—reasonable awards. It is difficult to see why the supreme court, after finding an amount set by the trial court unreasonably low (or high), should not also set a reasonable figure. To seek the lowest reasonable figure, the court must of necessity establish a reasonable range within the excessive jury award ($43,012 in the instant case) and the figure they themselves found unreasonably low ($13,012 in the instant case.) Within these limits must lie a range of reasonableness. This is certainly a more narrow range than the trial court has to work with when it is required to set a reasonable figure. It would appear more equitable for the supreme court to do the same.

The reason stated for requiring the lowest reasonable amount is that the trial judge, from his special vantage point, has set an even lower figure.[36] The supreme court, with the exception of its inability to observe the demeanor of the witnesses, has the same vantage point as the trial judge with many additional benefits. These would include the advantage of a concise and connected record, counsel's brief on the specific issue of damages, knowledge of the value of injuries from numerous cases on a statewide bases, a predetermined range from within which to work, and, of course, the knowledge and experience of seven legal minds as opposed to one at the trial level.

Therefore, it would appear better to continue the reasoning of *Powers*, which seeks the most reasonable award, rather than to turn the clock back to a method overruled some time ago and now to be applied again by, and only by, the very court that declared the search for the *most* reasonable figure as the objective of our existing law.

B. Inadequate Awards

The treatment of inadequate awards in Wisconsin prior to *Powers* can best be described in the words of our court itself:

[35] *Id.* at 628, 141 N.W.2d at 877.
[36] *Id.* at 629, 141 N.W.2d at 878.

> Where, in a case involving unliquidated damages, the amount found by the jury is deemed by the court wholly inadequate, it seems clear that the trial court may grant a new trial unless the plaintiff consents to take judgment for such increased amount found by the court to represent the least amount that an unprejudiced jury would probably find. Since the court finds the "least amount," plaintiff must be given an option to consent to the amount of damages found by the court. In such a situation the defendant may not complain because the court has only increased the damages to the least amount which it will permit to stand in lieu of granting a new trial.[37]

It should be noted that the option could also be granted to the defendant in this situation provided the amount set as reasonable damages by the trial court was the *largest* amount that a jury could properly award.

Prior to 1964, the issue of inadequate damages had not been treated under the *Powers* rule. However, the supreme court had stated that, in the proper case, if the damages were inadequate it could exercise its discretion under *Powers,* determine reasonable damages, and grant a new trial with the option to the defendant to consent to judgment for such an amount.[38] *Parchia v. Parchia*[39] appears to have been the "proper case." A jury award of $2,829.50 for personal injuries was deemed inadequate by the trial judge. He set $8,500 as a reasonable sum. The supreme court, specifically holding that *Powers* applied, saw no abuse of discretion in the trial court's finding of inadequacy, and agreed that the $8,500 was reasonable. It ordered a new trial on the issue of damages with an option to defendants, in lieu thereof, to elect to have judgment entered against them for the larger amount. Therefore, *Parchia* firmly established the *Powers* rule as applicable to inadequate as well as excessive awards.

However, the court used a later case to illustrate that any theory, procedure or rule, applicable under *Powers* to excessive awards, applied equally to inadequate awards. The court in *McLaughlin v. Chicago, M., St.P. & P.R. Co.,*[40] took its own language from *Boodry,* changed some key words, and came up with the following: (The original wording from *Boodry* has been put in parentheses after each word changed by the court)

> Where a trial court has reviewed the evidence and has found a jury verdict awarding damages to be inadequate (excessive) and has fixed an increased (a reduced) amount therefor, and has determined that there should be a new trial on damages unless the defendant (plaintiff) exercises an option to permit entry of judgment on the increased (reduced) amount, this court will

[37] Risch v. Lawhead, 211 Wis. 270, 278, 248 N.W. 127, 130 (1933).
[38] Cordes v. Hoffman, 19 Wis. 2d 236, 241, 120 N.W.2d 137, 140 (1963).
[39] 24 Wis. 2d 659, 130 N.W.2d 205 (1964).
[40] 31 Wis. 2d 378, 143 N.W.2d 32 (1966).

> reverse only if we find an abuse of discretion on the part of the trial court.
> In reviewing the evidence to determine whether the damages are inadequate (excessive) both the trial court and this court must view the evidence in the light most favorable to defendant (plaintiff).—On appeal from a determination by the trial court that the found damages were inadequate (excessive), this court will not find an abuse of discretion if there exists a reasonable basis for the trial court's determination after resolving any direct conflicts in the testimony in favor of defendant (plaintiff).[41]

C. Punitive Damages

Authors in the legal literature that followed *Powers* argued that logic would also demand the application of the rule to punitive damage situations.[42] The supreme court so held in *Malco, Inc. v. Midwest Aluminum Sales, Inc.*[43] In this contract action, the trial court decided that a verdict of both compensatory and punitive damages (in the defendant's favor on its counterclaim) was excessive. The court then reduced both awards and gave the defendant the option of accepting the reduced award or a new trial. On appeal, one of the questions related to the application of *Powers* to punitive damages. The court said:

> It seems to us that once the jury has decided in its discretion to award punitive damages, the amount thereof must be subject to the control of the court.

and continued:

> We hold that the *Powers* rule extends to punitive damages and a trial court has the power to reduce the amount of punitive damages to what it determines is a fair and reasonable amount for such kind of damages.[44]

These statements were reaffirmed in *Fuchs v. Kupper*[45] in which the court approved a reduction of punitive damages which were found to be excessive by the trial court.

D. Related Comments

Many recent cases contain comments concerning the *Powers* rule which can not be categorized within any other section of this paper. They will be brought together in this section.

The supreme court has discussed other circumstances, beyond abuse of discretion, in which a verdict will or will not be disturbed. These were summarized in *Kablitz v. Hoeft:*[46]

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[41] *Id.* at 390, 143 N.W.2d at 38.

[42] Ghiardi, *Exemplary or Punitive Damages in Wisconsin,* 1 Wis. Con't Legal Ed 69, 77 (1961).

[43] 14 Wis. 2d 57, 109 N.W.2d 516 (1961).

[44] *Id.* at 65, 109 N.W.2d at 521.

[45] 22 Wis. 2d 107, 125 N.W.2d 360 (1963).

[46] 25 Wis. 2d 518, 131 N.W.2d 346 (1964).

> The verdict will not be upset merely because the award was large or because the reviewing court would have awarded a lesser amount, but rather only where it is so excessive as to indicate that it resulted from passion, prejudice, or corruption, or a disregard of the evidence or applicable rules of law. Evidence must be viewed in the light most favorable to the verdict. A damage verdict which has been approved by the trial court will not be disturbed if "there exists a reasonable basis for the trial court's determination after resolving any direct conflicts in the testimony in favor of plaintiff."[47]

The court has also stated many times that an award will be accorded great weight if it has received the approval of the trial judge. This rule was stated very briefly by Justice Wilkie in *Gleason v. Gillihan*[48] in which the trial judge had stated, "That it is high from the viewpoint of this trial judge is unquestionable." In the opinion Justice Wilkie continued this statement by saying, "We agree. But the trial court did not find the award excessive. Neither do we."[49]

Attorneys have tried to use the comparisons of their cases with verdicts in similar cases to guide the court in setting a damage figure. This practice was commented upon in *Lother v. Keller*,[50] in which the court cited its statement in *Moritz v. Allied American Mutual Fire Ins. Co.*: ". . . a comparison with other verdicts at best can only be an imperfect analogy affording some guidelines to the solution but not necessarily determining the result. We consider that no useful purpose would be served in reviewing these cited cases."[51]

The most startling application of *Powers* was suggested by Chief Justice Hallows in *Lawver v. City of Park Falls*.[52] Speaking personally and not for the court he wrote:

> . . . the court should give consideration to the adoption of a rule, analogous to the *Powers* rule, for the determination of apportionment of causal negligence at the trial level and the appellate level. . . . It is now accepted that this court and trial courts can properly determine a reasonable sum for remittitur purposes when the amount of damages determined by the jury is found to be excessive. On the same basis this court or a trial court can properly determine a reasonable comparison of causal negligence when the jury's determination is found to be excessive with respect to one of the parties. Having found a reasonable comparison, the court could implement it by giving an appropriate option following the general procedure used when the *Powers* rule is applied.[53]

[47] *Id.* at 525, 131 N.W.2d at 350.
[48] Gleason v. Gillihan, 32 Wis. 2d 50, 145 N.W.2d 90 (1966); Kablitz v. Hoeft, 25 Wis. 2d 518, 131 N.W.2d 346 (1964).
[49] 32 Wis. 2d at 58, 145 N.W.2d at 93.
[50] 30 Wis. 2d 403, 141 N.W.2d 181 (1966).
[51] 30 Wis. 2d at 409, 141 N.W.2d at 184.
[52] 35 Wis. 2d 308, 151 N.W.2d 68 (1967).
[53] *Id.* at 314, 151 N.W.2d at 71.

While the procedure is set out by the Chief Justice as dicta in the opinion, the Bar should be alerted to the fact that at least one Justice has such a proposal under consideration.

E. Interest on Judgments

The previously discussed case of *Moldenhauer v. Faschingbauer*[54] reached the supreme court three times. The final appeal concerned the question of interest on the judgment and the date from which it begins to run after a verdict has been changed by application of *Powers*. Briefly, the court decided that the application of *Powers* did not affect the rule of section 271.04(4) of the Wisconsin Statutes which requires interest to run from the time a verdict is returned. Thus, once the original verdict is handed down, interest begins to run, despite any change due to *Powers*. The *Moldenhauer* decision offers an excellent example. A jury verdict of $43,012 was declared excessive by the trial judge. He set $13,012 as a reasonable amount. The supreme court declared this amount inadequate and raised it to $19,012, giving the option of accepting a new trial or judgment for the increased amount to the plaintiff. Interest ran from the date of the verdict ($43,012) but on the amount as finally determined and accepted ($19,012).

4. *Conclusion*

Justice Wilkie concluded his comprehensive comments of the earlier cases decided under *Powers* with four points,[55] three of which are strengthened by the recent cases:

> [1.] The supreme court changes a verdict only very infrequently and the number of times the court has done so is no greater since *Powers* than before.
> [2.] The supreme court gives great weight to a careful analysis of the award by the trial court and most often goes along with the trial court when has has made such an analysis.
> [3.] Since *Powers* there undoubtedly are fewer new trials on damage questions because the trial court decision and the current practice of setting a reasonable figure is much more likely to be acceptable to the parties than the former practice where the figure was either too low to please the plaintiff or too high to please the defendant.

The fourth conclusion reached by Justice Wilkie was that, since *Powers*, the supreme court has not been asked to review damage verdicts any more frequently than before the rule. This conclusion is questionable in light of recent cases. It appears that the *Powers* rule provides an automatic issue for appeal when no other exists and it is one to which clients will be receptive. Also, when other issues do exist and the rule

[54] 25 Wis. 2d 475, 131 N.W.2d 290, 132 N.W.2d 576 (1964); 30 Wis. 2d 622, 141 N.W.2d 875 (1966); 33 Wis. 2d 617, 148 N.W.2d 112 (1967).
[55] Wilkie, *Personal Injury Damage Verdicts: Supreme Court Rulings Since the Powers Rule*, 47 MARQ. L. REV. 368, 377 (1964).

has been applied, the application of the rule is almost always included as an additional issue for the court's determination. Does this not add to the burden of the court? A cursory examination of cases in Minnesota and Wisconsin (states of almost equal population) in which the inadequacy or excessiveness of damages appears as an issue on appeal in a one year period, July, 1966 through June, 1967, shows approximately seventeen cases in Wisconsin and six in Minnesota. Nevertheless, this may be a worthwhile price to pay in support of a fair and equitable method in the solution of the problem of excessive and inadequate awards for both the plaintiff and the defendant.

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